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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1303~~ 129

WILLIAM BENTVENA and
WILLIAM STRUZZIERI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, William Bentvena and William Struzzieri, pray that a writ of certiorari issue to review the judgment of affirmance by the United States Court of Appeals for the Second Circuit entered February 23, 1966 and further described *infra.*

Opinions Below

The opinion of the Court of Appeals, printed in the Appendix hereto, *infra,* is not yet reported. The District Court did not render an opinion.

Jurisdiction

The judgment of the Court of Appeals was entered February 23, 1966.* A timely petition for rehearing on

* The judgment is not available to us for printing in the Appendix hereto because it was filed in this Court some time ago by another petitioner, Samuel Mondstersky.

behalf of both petitioners was denied March 14, 1966. Mr. Justice Harlan has granted an extension of time to and including May 13, 1966 within which to petition for certiorari in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioners were convicted of narcotic violations and sentenced to imprisonment. The questions are:

1. Should the judgments of conviction be reversed and the indictment dismissed because the meagerness, remoteness and incredibility of the Government's proofs require acquittal as a matter of law?

2. Should there have been applied in this case the standard that a criminal case ought to be determined by the Trial Judge to be improper for submission to the jury when, in the Trial Judge's own judicial opinion as a matter of law the proof is such that reasonable men could not differ in believing that a reasonable doubt exists?

Constitutional Provision and Statute Involved

The case involves the due process clause of the Fifth Amendment, and 21 U.S.C. §§ 173, 174. The latter statutes read as follows:

> **"§ 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures**
>
> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Nar-

cotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. Feb. 9, 1909, c. 100, § 2(b), (d), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, § 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; June 14, 1930, c. 488, § 3, 46 Stat. 586."

"§ 174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any

territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, § 2(c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, § 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, §§ 1, 5(1), 65 Stat. 767; July 18, 1956, c. 629, Title I, § 105, 70 Stat. 570."

Statement of the Case

1. Introductory

Petitioners were convicted in the United States District Court for the Southern District of New York, after a jury trial, of narcotics violation under 21 U.S.C. §§ 173, 174 (33a,

35a*). Struzzieri was convicted on two substantive counts (33a), Bentvena on one substantive count (35a). Each of the defendants was sentenced to six years, Struzzieri's sentence to run concurrently on his two conviction counts (33a, 35a).

The United States Court of Appeals for the Second Circuit affirmed the convictions. Certiorari is sought herein to review said affirmance of the convictions.

2. The Indictment; the Prior Two Trials

The indictment was originally filed May 5, 1960, containing eight counts (including one conspiracy count) and naming 29 defendants (*United States* v. *Bentvena,* 319 F. 2d 916, 921 (C.A. 2 1963)), cert. den. *sub nom. Ormento et al.* v. *United States,* 375 U. S. 940. The first trial of the indictment, before District Judge Levet and a jury, ended in a mistrial after a trial of six months (*ibid.*). In the second trial, before District Judge MacMahon and a jury, the within appellants Bentvena and Struzzieri were convicted, but their convictions were reversed by the Court of Appeals (*ibid.*); the order of reversal remanded the case as to Bentvena and Struzzieri for a new trial on the substantive counts only (*ibid.*). The instant third trial was had against Bentvena, Struzzieri and a third defendant, Monastersky. Struzzieri was tried on the Fourth Count, which charged him and Monastersky** with a sale etc. of heroin on Janu-

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* " a" refers to the printed "Appellants' Appendix" (blue cover, 40 pages) in the Court below, nine extra copies of which were filed in this Court when the record was docketed on behalf of another certiorari petitioner, Samuel Monastersky, who was a co-defendant in this trial. The printed Appendix does not include any testimony. The testimony is cited to the typewritten stenographic minutes of the trial by page number (cited as "Tr. "). The stenographic minutes are being filed in this Court by the within petitioners Bentvena and Struzzieri.

** The Fourth Count had originally named also Marcantonio Orlandino as a defendant, but the latter's name was stricken from the Fourth Count at the outset of this trial.

ary 6, 1959 (6a), and upon the Fifth Count which charged him Bentvena and Monastersky with a sale etc. of heroin on January 13, 1959. Bentvena was charged and tried herein only under the Fifth Count (7a).

3. The Limitation of the Issues Pursuant to the Order of Reversal in the Appeal from the Second Trial

The conviction of Bentvena and Struzzieri in the second trial (before Judge MacMahon) was found by the Court of Appeals to have been unjustified on the conspiracy count inasmuch as there was insufficient independent proof of their participation in the conspiracy, and unjustified on the substantive counts owing to the prejudicial effects of the hearsay received under the conspiracy count (*United States* v. *Bentvena,* 319 F. 2d 916, cited *supra*).

4. The Government's Theory of the Proofs in this Third Trial

The Government contended that on two occasions in January 1959 Monastersky and one Richard McGovern (since deceased) sold one-half kilo quantities of heroin to a narcotics agent, Georgio, that Struzzieri was involved in delivering the heroin in the first transaction (January 6, 1959) to the sellers, and that Bentvena and Struzzieri were involved in the delivery to the sellers in the second transaction (January 13, 1959).

While the Government of course refrained from endeavoring to inject into this third trial any of the former conspiracy proofs under the original indictment which were closed off by the Court of Appeals in the appeal from the convictions in the second trial, we maintain that the Government improperly used much proof concerning alleged activities of Monastersky and McGovern which took place out of the presence of Bentvena and Struzzieri; that it also improperly used proof concerning Struzzieri which

related to matters outside of the presence of Bentvena; and, above all, that the Government's proofs concerning both Bentvena and Struzzieri in this third trial were not only too meager and remote for submission to the Jury, but were so ridden with incredibility and inconsistency as to present an issue of law concerning their rational sufficiency under the standards of proof of a *prima facie* case and proof beyond a reasonable doubt.

5. The Trial Proofs as to the Alleged Transaction of January 6, 1959 (Struzzieri, Fourth Count)

Narcotics agent Georgio described in detail his dealings with Monastersky and McGovern which led to the alleged sale of January 6, 1959 (Tr. 3-23). Georgio said that the small package containing one-half kilo of heroin was wrapped in an outer wrapping of a Christmas type of paper, blue in color with pictures of a snowman imprinted on it (Tr. 14, 20-21). He said that he took this package to an automobile where Agent Mangiaracina was waiting (Tr. 63-65, 157-159). Since the Government also introduced testimony (*infra*) of another agent that Struzzieri had been seen carrying a package of the same description to the apartment where Georgio allegedly got the package from McGovern and Monastersky, the question of the correct description of the package was a prime factual issue at the trial.

Agent Mangiaracina testified in the most positive and unequivocal way that the package which Georgio said was wrapped in blue Christmas paper was actually a brown package (Tr. 97-98, 134-140, 142, 144). It was evident from the cross examination of Mangiaracina that he felt himself to be under a strong official inclination or pressure to corroborate Georgio's description of the package, but Mangiaracina's testimony adhered to the description of the package as brown (Tr. 134-140).

Narcotics Agent Schrier testified that on the night of January 6 he had seen Struzzieri as a passenger in an automobile driven by Orlandino in the immediate vicinity of the apartment where Georgio allegedly got heroin from McGovern and Monastersky (Tr. 164, 166-167); and that after Georgio had paid over the money he (Schrier) saw Struzzieri get out of the automobile, meet and talk briefly with McGovern on the street, enter the building with McGovern and shortly thereafter drive off in the car with Orlandino, Schrier following them to a diner in Nassau County where he heard Orlandino say to Struzzieri, "I hope this guy trusts Sammy with the money the next time" (Tr. 171-177).*

Narcotics Agent Morgan testified that on the night of January 6 he had overheard a conversation between Orlandino and Struzzieri in a luncheonette in Manhattan in which Struzzieri said "I don't like this guy", Orlandino asked him "What guy?" Struzzieri said "This guy tonight. He should have paid the money like a man", Orlandino said "Yes, he should pay on demand" and then Orlandino added "You know, you have to be careful. A guy could be your best friend and he could turn you" (Tr. 246-247).

Narcotics Agent Ward testified that on the night of January 6 (as described by Agent Schrier) an Oldsmobile had been seen in the block where Georgio allegedly got the heroin from Monastersky and McGovern, that Struzzieri got out of the Oldsmobile carrying a blue and white Christmas type package and he entered the building and pushed a bell, that after this Struzzieri left the building carrying nothing and got back in the car with Orlandino, the car driving to Nassau County (Tr. 260-267). In a lengthy cross examination of Ward it developed that his opportuni-

* According to the Government's theory "Sammy" meant Monastersky, and the reference about trusting "Sammy" had to do with Georgio's having insisted upon certain security precautions before turning over the money on that night.

ties for reliable vision of the package at the distances and under the lighting conditions involved were extremely questionable, to say the least, especially as regards Ward's claim that he could see a "snowman" design on the blue Christmas wrapping (Tr. 274-304, 311-313).

The Government's chemist-witness, Milos, testified to nothing concerning the alleged Christmas wrapping; he received the heroin for testing in a glassine bag (Tr. 427-433).

The defense introduced testimony by a surveyor and a photographer concerning the street layout and street distance measurements of the scene where the Government's agents are supposed to have observed with such precise detail the alleged happenings during the nighttime and at distances which would appear to preclude the claimed observations as a matter of the sheer possibilities of human physiological optics (Tr. 448-449, 450-457).

6. The Trial Proofs as to the Alleged Transaction of January 13, 1959 (Bentvena and Struzzieri, Fifth Count)

Agent Georgio testified that in connection with his alleged second purchase of heroin from Monastersky and McGovern, on January 13, 1959, McGovern now having moved to a different address, Georgio noticed the names "Connors" and McGovern on the doorbell for the apartment, when he came upstairs the sellers were not ready for him, Georgio returned a little later at which time he saw Bentvena and Struzzieri entering the building, Monastersky arrived in front of the building and asked Georgio to take a walk with him to discuss the finances, then when Monastersky and Georgio re-entered the apartment house Georgio saw Bentvena and Struzzieri coming down into the lobby, Georgio and Monastersky then went up to the apartment, Georgio heard the intercom buzzer, and thereafter the transaction was concluded, the heroin this time being in a brown paper package (Tr. 23-51).

Mangiaracina testified that while Georgio was upstairs in the apartment he saw Bentvena and Struzzieri coming down the stairs, they walked into the front foyer, and Bentvena pushed a buzzer and said "Connors"; five or ten minutes later Bentvena and Struzzieri returned to the building, pushed a buzzer, went upstairs, and came down again after a very short time (Tr. 103-106).

Schrier testified to seeing Bentvena and Struzzieri coming out of the apartment building, go to a nearby bar where Bentvena made a phone call, and then they drove off in a 1952 Chevrolet (Tr. 179-180).

Narcotics Agent Wurms testified that he saw Bentvena and Struzzieri go into the apartment building, then Monastersky came out and joined Georgio, then Bentvena and Struzzieri came out of the building and went to a Chevrolet parked nearby, Bentvena took a brown paper package from the trunk while Struzzieri stood by the car, and then both of them re-entered the apartment building; after that Bentvena and Struzzieri left the apartment building and went to a nearby bar, they were not carrying anything; they then went back to the apartment building and later they again left there, driving to Valley Stream, Long Island, Bentvena being the driver, and Struzzieri was looking back out of the rear window of the car (Tr. 314-322). The cross examination of Wurms brought out that he had not spoken of any brown paper package at the prior trial (Tr. 365-370), and that his opportunities for accurate vision under nighttime conditions and at the street distances involved were poor (Tr. 327-370).

Narcotics Agent Fitzgerald, who had not testified in either of the prior trials (Tr. 395-396), testified practically word-for-word along the same lines as Wurms (Tr. 385-392). Fitzgerald claimed that he could see the brown color of the package which Bentvena allegedly took out of the trunk of the car, at a distance of at least 75 to 80 feet under poor nighttime lighting conditions (Tr. 416).

7. The Defense Motions

The motions at the end of the Government's case appear at Tr. 438-444; they were renewed at the end of the entire case at Tr. 460-461. The grounds of the motions were substantially those urged in our "Reasons", *infra.*

8. The Decision of the Court of Appeals; the Petition for Rehearing in the Court of Appeals

Under our "Reasons", *infra,* we are obliged to present a rather detailed analysis of the opinion of the Court of Appeals, because we contend that the Court misapprehended our arguments addressed to the issues as to the proper standards for submission of the case to the Jury. This contention of ours that the Court of Appeals misapprehended our formulation of the issues, and that it did not come to grips with the issues, was presented by us to that Court in a petition for rehearing*, which was denied.

The within petitioners Bentvena and Struzzieri confined their prayer in the Court of Appeals to one for reversal with directions to dismiss the indictment. We did not request a remand for a new trial. We took the position in the Court of Appeals that the proofs in this trial record demonstrate that the Government has no case for indictment or trial against these petitioners, and that both the interests of Federal criminal justice and the sheer financial and emotional inability of the petitions to sustain the ordeal of a fourth trial favored either an order of affirmance or an order of reversal with directions to dismiss the indictment.

Reasons for Granting the Writ

We realize that we are undertaking, in this certiorari application, a forbidding task in requesting this Court to

* The petition for rehearing is part of the certified record previously filed herein by the co-petitioner Monastersky.

devote its busy attentions to a criminal trial record in order to determine whether the proofs were sufficient for submission to a jury as a matter of law. We respectfully suggest that our request is justified because the case affords a proper occasion for this Court to consider also an aspect of general importance to the administration of Federal criminal justice, namely, the question (posed in our "Question Presented" No. 2) as to whether there are not necessarily situations, of which this case is an example, where a Federal trial Judge in a criminal case should take on the responsibility and the duty of deciding as a matter of law that the case is unworthy for submission to a jury because reasonable men could not differ in concluding that a reasonable doubt exists. This standard which we are suggesting for judicial screening of the Government's proofs in Federal criminal prosecutions is not the conventional "*prima facie* case" standard.

We take it that the Court of Appeals' reversal of the convictions of Bentvena and Struzzieri in the second trial imported into this prosecution, or should have imported, that in any retrial of those two defendants the utmost judicial care should be observed to insure, once and for all, that the actual proofs of guilt distinctly affecting these two defendants, and nothing else, should be determinative. From the outset of this prosecution the supposed proofs relating to Bentvena and Struzzieri have been not only of the merest collateral character in the circumstantial sense, but they have been also of that merely tendentious character which the law so strongly discountenances as amounting to mere "guilt by association".

Just as there was apparently no doubt—in the view which the Court of Appeals took of the prior appeal—that Bentvena and Struzzieri could scarcely have been convicted in the second trial without the prejudicial overflow of conspiracy "hearsay", so we submit, there can be no doubt that a conviction would have been impossible in this third trial without the mass of evidence (all "hearsay" as

to Bentvena and Struzzieri) of the alleged activities of McGovern and Monastersky. For the proofs distinctly affecting Bentvena and Struzzieri, respectively, are in themselves so thin. The Trial Court expressed the view in this trird trial, about midway through the trial, that the Jury might infer that the defendants were all "acting in concert", "and even though there is no conspiracy charged the joint action on the conduct of one is binding on the other" (Tr. 244). On the other hand, in its charge to the Jury, the Court instructed that Agent Georgio's conversations when Bentvena and Struzzieri were not present were not binding on Bentvena or Struzzieri (8a). Under what thus appears to have been the Trial Court's final view of the situation, it must be taken that the only probative matters in this trial record concerning Bentvena and Struzzieri are those which relate specifically to their own directly proved alleged activities.

So viewing the trial proofs, it is impossible, we repeat, to see how the Trial Court could have deemed the case appropriate for submission to the Jury.

Thus, as to Struzzieri under the Fourth Count, the evidence consists solely of Agent Georgio's testimony that the package of January 6, 1959 was wrapped in blue Christmas paper, Agent Mangiaracina's directly contrary testimony that it was wrapped in brown paper, Agent Ward's testimony that he saw Struzzieri carrying a blue and white Christmas type package, Agent Schrier's and Agent Ward's testimony of seeing Struzzieri enter McGovern's apartment building, Agent Schrier's testimony of seeing Struzzieri in McGovern's company on the street and entering McGovern's building with him, Agent Schrier's testimony of hearing Orlandino say to Struzzieri that he hoped "this guy trusts Sammy with the money the next time", and Agent Morgan's testimony of an intriguingly similar kind of conversation in still another place where (this time) Struzzieri was the one who said to Orlandino something in criticism of the way "this guy" paid the money.

Aside from the irreconcilable conflict between Agent Georgio and Agent Mangiaracina as to the appearance of the package, we respectfully emphasize also the shattering impeachment of the testimony of Agent Ward which was the sole testimony linking Struzzieri with the alleged Christmas type package, and which depended upon observational opportunities that simply did not and physically could not exist.

As to the testimony of the alleged conversations concerning the unsatisfactory financial manners of "this guy", this was never acceptably tied in with any claimed happenings between Agent Georgio and the sellers from which it might be inferred that Struzzieri knew Georgio was being cautious about payment of the mony. Indeed this whole branch of the case can hardly be called even speculative.

The fact therefore seems to be undeniable that Struzzier's conviction and sentence under the Fourth Count depends upon an impermissible series of the most attenuated kind of inferences, all of which is moreover to be evaluated in the light of the extremely poor probative quality of the testimony concerning the wrappings on the package (Agent Georgio *versus* Agent Mangiaracina) and the alleged observation of Struzzieri carrying a Christmas-wrapping type of package (Agent Ward).

As to the alleged transaction of January 13, 1959, involving both Bentvena and Struzzieri, the sole testimony is by Agent Georgio that he saw the name "Connors" on McGovern's doorbell, that he saw Bentvena and Struzzieri in and around the apartment building, and that while he was in McGovern's apartment he heard the intercom buzzer (after he had seen Bentvena and Struzzieri in the lobby); the testimony of Agent Mangiaracina that he saw Bentvena and Struzzieri coming down the stairs and in the lobby, heard Bentvena say "Connors" while pressing a buzzer, and saw Bentvena and Struzzieri later again go in and out of the apartment building; the testimony of Agent Schrier

that he saw Bentvena and Struzzieri coming out of the building; and the testimony of Agents Wurms and Fitzgerald that they saw Bentvena and Struzzieri go in, then out of the building, then saw Bentvena take a brown paper package from the trunk of a car while Struzzieri stood by the car, then saw them again enter and leave the building and drive to Long Island with Struzzieri peering out of the rear window of the car.

Again, this testimony by the Government witnesses concerning Bentvena and Struzzieri in relation to the alleged happenings of January 13, 1959, establishes nothing more than that they were seen in or around the apartment building, that Bentvena took a really rather nondescript package out of a car and into the apartment building, and that they later drove away with Struzzieri apparently acting in a furtive manner.

Again also, the alleged observations by Agents Wurms and Fitzgerald of the removal of the package from the car by Bentvena, are to be evaluated in the light of the cross examination as to the extreme implausibility (to say the least) of the agents' having had the necessary visual opportunity.

No Government witness testified to seeing Bentvena or Struzzieri in possession of any narcotics, or engaging in any money transactions.

It is impossible to avoid the conclusion that Bentvena and Struzzieri have been convicted in this case on the basis of mere suspicion arising from their presence in the vicinity and "guilt by association".

While we of course realize that neither the Court of Appeals nor this Court sits to review the Jury's findings as to credibility of witnesses or in regard to conflicting evidence, the decisions do nevertheless indicate that, in a proper case, the Federal Courts of Appeals are willing to exercise a power of factual review to avoid plain

injustice. Thus, in *Farrar* v. *United States*, 275 F. 2d 868 (C.A. D.C. 1960), where issues of veracity were involved, the rule was followed that "we must reverse a criminal conviction when it is 'clear to us that upon the evidence * * * a reasonable mind must necessarily have had a reasonable doubt as to * * * guilt'" (at p. 870).

Cf. especially the earnest and scholarly proposals of the late Judge Jerome Frank in his concurring opinion in *United States* v. *Castro*, 228 F. 2d 807 (C.A. 2 1956), that the Federal trial and appellate courts should determine whether a criminal case is improper for submission to the jury because reasonable men could not differ in believing that a reasonable doubt exists.

It was open to the Court of Appeals to apply this salutary canon (proposed by the late Judge Frank) in this case, the instant trial record being a particularly apt one for the purpose.

Cf. also *United States* v. *Litberg*, 175 F. 2d 20, 21 (C.A. 7 1949), reversing a conviction for passing counterfeit money, where the Court said, "* * * while the trier of the facts is entitled to draw all reasonable inferences from the circumstances in proof, a court of review is charged with the responsibility of determining the reasonableness of such inferences." Cf. also *Cartright* v. *United States*, 335 F. 2d 919 (C.A. 10 1964), where, although the conviction was affirmed because "there was detailed and substantial evidence properly before the Jury to sustain the verdict", the Court also said "in examining the evidence to determine whether it is substantial * * *, it must clearly do more than raise a suspicion of the existence of the facts sought to be established, or a suspicion of guilt" (at p. 921). Similarly in *United States* v. *Conti*, 339 F. 2d 10, 13 (C.A. 6 1964), while affirming the conviction, the Court said "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".

The authorities just cited plainly denote, we submit, that this Court—or a Federal Court of Appeals—sitting in review of a criminal conviction is far from powerless to apply its corrective hand when, as we respectfully maintain is the case here, there has been an outright miscarriage of justice on the facts, i.e., in point of their manifest insufficiency for submission to the Jury or for conviction.

In essence, then, the argument which we presented to the Court of Appeals was that no case was made out for submission to the Jury, and we specifically asked the Court to apply the standard that a criminal case should be determined by the Trial Court to be improper for submission to the Jury when, in the Trial Court's own judicial opinion as a matter of law, the proof is such that reasonable men could not differ in believing that a reasonable doubt exists.

While the Court of Appeals' opinion affirming the convictions correctly noted that we were urging the issue of the sufficiency of the evidence to permit the case to be submitted to the Jury, the opinion did not distinctly consider the above-mentioned standard, and there is language in the opinion indicating that the Court was declining (or failing) to differentiate between (1) the question of the Trial Court's justification for submitting the cases to the Jury, and (2) the substainability of the Jury verdict as such based on the evidence submitted for the jurors' consideration.

Thus, at page 1024 of the slip opinion*—where the Court discusses the co-appellant Monastersky, but where the Court's analysis and language evidently bear on the case as a whole—the Court speaks in the same paragraph of (1) its being "quite clear that the Government's case * * * was sufficient to go to the Jury", and (2) of the justification for the Jury's verdict as such, i.e., "We surely cannot disturb a jury verdict based on such evidence".

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* In printing the opinion in the Appendix hereto, *infra*, we have retained the original page numbers, enclosed in brackets at the bottom of each page.

Thus also at pages 1024-1026 of the slip opinion, where the Court speaks of the January 6 count involving Struzzieri, the Court (1) does several times refer to whether there was sufficient evidence to go to the Jury, but the Court (2) also writes in terms of the Jury's province of "resolution" of a "variance" in the evidence, and then the Court goes on to discuss not only whether the case should have been submitted to the Jury under such theory of the Jury's right to resolve the variance, but also the Court speaks in terms denoting that the Court was also finding that the Jury had correctly resolved the variance in the evidence—in this last regard see the Court's statement at page 1026 that "We should not disturb this permissible resolution of the variance since this is precisely the sort of task that juries are best able to perform".

From these combined features of the Court of Appeals' reasoning at pages 1024-1026, it is plain that the Court was not distinctly preserving the analytical differentiation between the issues of (1) whether a case was made out for submission to the Jury, and (2) whether the Jury verdicts are sustainable.

Similarly, in the full paragraph which starts and ends on page 1026 the Court juxtaposed indistinct aspects of the latter two ideas, in the sentence reading "In other words, Struzzieri's claim is not that the Government failed to present evidence from which reasonable men could be convinced of a certain fact beyond a reasonable doubt; rather he claims that the physical facts so contradict Ward's testimony as to render that testimony unbelievable". And then the Court states that, "Deciding whether certain evidence should be believed is precisely the task set the Jury in a prosecution such as this; we should not interfere with the Jury's decision in this case that Ward's testimony was credible". In this item the Court of Ap-

peals not only dealt indistinctly with the separate issues of propriety of the case for submission to the Jury on one hand and propriety of the Jury verdict on the other hand, but also the Court did not give us the benefit of distinctly perceiving that our claim was precisely that which the Court said it was not, i.e., we say our claim was that the Government did fail to present evidence from which reasonable men could be convinced of a certain fact beyond a reasonable doubt; and we therefore also respectfully say that the Court did not give us the benefit of considering adequately our distinct contention that this is a proper case for applying the test of whether the Trial Judge as a matter of law should have kept the case from the Jury because reasonable men could not differ in determining that a reasonable doubt existed.

Altogether, in this last portion of the Court of Appeals' opinion of which we are here speaking—the full paragraph appearing on page 1026 of the opinion—the Court simply did not consider and decide our fundamental contention that this was a suitable case for applying the latter test, rather than the more conventional test of whether a "*prima facie* case" had been made out for submission to the Jury.

As regards the January 13 count (slip opinion, pp. 1026-1028), there is again, an important element of indistinctness in the Court of Appeals' analysis of the separate issues of sufficiency of the case for submission to the Jury and maintainability of the Jury verdict. For, the Court refers (p. 1028) both (1) to "Considerations similar to those that caused us to affirm the Jury's verdict of guilty based on the evidence relating to the January 6 sale"—the Court's language continuing at this point with the words "cause us to hold that the evidence introduced by the Government relating to the January 13 sale was sufficient to support the Jury's verdict of guilty as to the latter transaction"—and (2) to the theme that "we cannot say that reasonable jurors

could not have found beyond a reasonable doubt that Struzzieri and Bentvena delivered the heroin," etc. Here again, then, there occurs in the Court of Appeals' reasoning a kind of merger or blend as between the issue of sufficiency of the case for submission to the Jury and the issue of the evidentiary adequacy of the Jury verdict. But more important, there seems to be present here again, in the Court of Appeals' reasoning, an indistinctness in the Court's approach to our fundamental argument that it was for the Trial Court in the first instance to rule as a matter of law that the case should not have been submitted to the Jury because reasonable men could not differ in finding that a reasonable doubt existed on the face of the Government's proofs.

Nowhere in the Court of Appeals' opinion is there any discussion of the latter test which we were above all asking that Court to consider and to apply, the test of whether the proofs were such that the Trial Judge should have withheld the case from the Jury because as a matter of law reasonable men could not differ in finding that a reasonable doubt was present. True, the omission from the Court of Appeals' opinion of any explicit discussion of this latter test may well reflect that Court's deliberate declination to take up our proposal that such test was the right one to be considered and applied in this case. However, we respectfully feel justified in requesting this Court to consider the point because of its general importance and in justice to our petitioners herein.

CONCLUSION

It is respectfully submitted that this joint petition for writ of certiorari should be granted.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioners,
William Bentvena and William Struzzieri

APPENDIX

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 63—September Term, 1965.

(Argued October 20, 1965 Decided February 23, 1966.)

Docket No. 29732

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

WILLIAM BENTVENA and WILLIAM STRUZZIERI,

Defendants-Appellants.

Before:

WATERMAN, MOORE and FRIENDLY,

Circuit Judges.

Each defendant was convicted of selling narcotics in violation of 21 U.S.C. §§ 173-74. The United States District Court for the Southern District of New York, McGohey, *J.*, rendered a judgment of guilty after a jury trial, and the defendants appealed. Affirmed.

HOWARD L. JACOBS, Asst. United States Attorney, Robert M. Morgenthau, United States Attorney, Neal J. Hurwitz, Asst. United States Attorney, *for Appellee.*

JEROME LEWIS, Brooklyn, N. Y., *for Appellants Bentvena and Struzzieri.*

ROBERT KASANOF, New York City, *for Appellant Monastersky.*

WATERMAN, *Circuit Judge*:

By this opinion we affirm the convictions of three codefendants, who, having been charged with violations of 21 U. S. C. §§ 173, 174 on January 6 and January 13, 1959, were each severally found by a jury to be guilty as charged. Samuel Monastersky and William Struzzieri were convicted of unlawful involvement on both occasions, William Bentvena as to the January 13 violation only.[1]

On this appeal, appellants Bentvena and Struzzieri argue that the judgments against them should be reversed and the pertinent counts of the indictment dismissed as to them,[2] because the Government's proof tending to show their guilt was so meager that the trial court erred in failing to direct verdicts in their favor at the close of the Government's case. Appellant Monastersky states his willingness to adopt his codefendants' argument as his own should it commend itself to this court, but he mainly relies upon the argument

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[1] The indictment out of which these convictions arise was filed on May 5, 1960. It named twenty-nine defendants and contained eight counts. The first trial on the indictment ended in a mistrial after six months. The second trial resulted in the conviction of thirteen defendants, including the present appellants, on counts four and five charging substantive violations of the narcotics laws and on count eight, the general conspiracy count. On June 13, 1963 our court affirmed the convictions of nine of the defendants but reversed the convictions of appellants and the defendant Salvatore Panico and remanded for a new trial. *United States v. Bentvena*, 319 F. 2d 916 (2 Cir.), *cert. denied*, 375 U. S. 940 (1963). This appeal follows the third trial.

[2] Appellants Bentvena and Struzzieri seek only a reversal with directions that the indictment be dismissed, they do not seek a new trial.

that the Government should not have been allowed to avail itself of the evidentiary rule contained in 21 U. S. C. § 174[3] because it failed to prove he had possession of the heroin that was the subject matter of the transactions of January 6 and January 13. He concludes that without the benefit of this rule his conviction cannot stand. We take up these separate contentions in order.

I.

The initial issue is whether the evidence presented by the Government during its case-in-chief was sufficient to permit the cases against any or all of these defendants to be submitted to the jury. We look first to the evidence relating to the January 6 transaction in which only Monastersky and Struzzieri were allegedly involved. The case against these two codefendants, based almost entirely on the trial testimony of several federal narcotics agents, can be briefly summarized. On January 5, Agent Giorgio had arranged with Monastersky to purchase from him on the following day one-half kilogram of heroin for $6,000. At about 8:40 P.M. on January 6 several agents observed Monastersky enter 525 East 88th Street. Several minutes later a car arrived on the scene and parked. Struzzieri got out and entered the same building Monastersky had previously entered. A second federal agent, Agent Ward, testified that when Struzzieri left the car and entered the build-

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[3] It is a federal offense under Section 174 to import narcotics illegally or to deal in such drugs with knowledge that they have been illegally imported. The statute goes on to provide: "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." In the present case Monastersky argues the Government did not prove he had or had had possession of the heroin which was the subject of the illegal transactions.

ing he was carrying a package wrapped in blue paper on which appeared a white snow man design. Shortly thereafter Struzzieri left the building empty handed and drove off in the same car in which he had arrived. At about 9:30 P.M. one Richard McGovern left 525 East 88th Street carrying a package and proceeded to 448 East 87th Street. A short time later Monastersky brought Agent Giorgio to 448 East 87th Street. There they met McGovern in an apartment in this building, McGovern produced a package wrapped, according to Giorgio, in blue paper on which appeared a white snow man design and the package, when opened, contained a white powder later proved to be heroin. The three men then left the apartment; once outside Giorgio handed McGovern $6,000 and McGovern gave the agent the package, which contained about one-half a kilogram of heroin. Giorgio took the package to an automobile where a third agent, Agent Mangiaracina, was waiting. There was also testimony tending to show that Struzzieri met McGovern for a few minutes later in the evening.

Assuming for the moment that the trial court correctly charged the jury that it could find Monastersky had "possession" of the heroin sold on January 6 sufficient to justify reliance on the rule contained in 21 U. S. C. § 174 it is quite clear that the Government's case against Monastersky relative to this January 6 sale was sufficient to go to the jury. Indeed, the evidence tending to prove that Monastersky was actively involved in this unlawful sale was largely uncontradicted. We surely cannot disturb a jury verdict based on such evidence. See *United States* v. *Dardi*, 330 F. 2d 316 (2 Cir.), *cert. denied*, 379 U. S. 845 (1964).

Whether the Government's case concerning the January 6 sale of heroin made out a case against Struzzieri sufficient to go to the jury is a closer question. Essentially, the Government's case against Struzzieri consists of Giorgio's tes-

timony that he received the heroin from McGovern and Monastersky in a package wrapped in blue paper on which appeared a white snow man design, and the testimony of Ward that he observed Struzzieri carrying just such a package enter 525 East 88th Street shortly after Monastersky had entered the building and only a few hours before a package so wrapped was passed to Giorgio. The Government contends this evidence was sufficient to allow a reasonable jury to find that Struzzieri brought to McGovern and Monastersky the heroin that the latter pair then sold to Giorgio. Struzzieri argues that the issue of his guilt should not have been submitted to the jury because crucial testimony of several narcotics agents was "meager," "remote," and "incredible."

In support of his argument Struzzieri first points to the fact Agent Mangiaracina, who waited in an automobile for Giorgio to return with the heroin on the evening of January 6, testified the package Giorgio brought with him to the automobile was brown in color. Unquestionably, this testimony as to the color of the package varied from Giorgio's testimony that the package was blue and white. Nevertheless, the jury could well have determined that Mangiaracina was mistaken in his recollection of the color and that Giorgio's testimony was to be believed. Such a resolution of the variance, which would tend to incriminate Struzzieri, would be supported by the testimony of Agent Ward who stated that the package Struzzieri carried when he entered 525 East 88th Street was wrapped in blue paper on which appeared a white snow man design. We cannot say that such a resolution of this evidential variance would be unreasonable; therefore we should not replace it with our own. This is not a case in which two segments of the Government's proof were absolutely essential to support a conviction and each contradicts the other. *United States* v.

Moret, 334 F. 2d 887, 893 (2 Cir. 1964) (Waterman, *J.*, dissenting), *cert. denied*, 379 U. S. 993 (1965). Rather, here there was a conflict in the Government's proof tending to establish only one fact among many facts that together tended to prove Struzzieri was carrying the package that contained the heroin subsequently sold to Giorgio. Undeniably the variance as to the color of the wrapping paper weakened the Government's case against Struzzieri. Nevertheless, the jury concluded the package that Giorgio received from Monastersky and McGovern was the package Struzzieri brought to the latter pair earlier in the evening. We should not disturb this permissible resolution of the variance since this is precisely the sort of task that juries are best able to perform. *United States* v. *Dardi, supra; United States* v. *Tutino*, 269 F. 2d 488 (2 Cir. 1959).

Struzzieri also contends the Government's case tending to involve him in this January 6 transaction was fatally weak because Agent Ward's testimony that he observed Struzzieri enter 525 East 88th Street carrying a package wrapped in blue paper on which appeared a white snow-man design was incredible and unworthy of belief because of the distance separating Ward from Struzzieri and the poor lighting conditions at that time. In other words, Struzzieri's claim is not that the Government failed to present evidence from which reasonable men could be convinced of a certain fact beyond a reasonable doubt; rather he claims that the physical facts so contradict Ward's testimony as to render that testimony unbelievable. We disagree. Deciding whether certain evidence should be believed is precisely the task set the jury in a prosecution such as this; we should not interfere with the jury's decision in this case that Ward's testimony was credible.

We next turn to consider whether the Government's evidence relating to the January 13 transaction in which all

of the defendants were allegedly involved was sufficient to permit the case against any or all of them to be submitted to the jury. Again, the case against Monastersky, Struzzieri and Bentvena was based almost entirely on the trial testimony of several narcotics agents, and it, too, can be briefly summarized. Agent Giorgio made arrangements with Monastersky to purchase another half kilogram of heroin on January 13 from Monastersky and McGovern for $6,000. On that date, at about 9:25 P.M. Bentvena and Struzzieri arrived in a car on East 88th Street; they parked and entered the apartment building numbered 525. Shortly thereafter Monastersky came out of this building and met Agent Giorgio who had been waiting in the immediate vicinity for some time. Giorgio introduced Agent Mangiaracina to Monastersky as his partner and while Mangiaracina waited in the lobby of the building Monastersky and Giorgio made their way to apartment 2-H, which was McGovern's apartment. While doing so they met Struzzieri and Bentvena coming toward them in the opposite direction. When Bentvena and Struzzieri arrived in the lobby Mangiaracina observed Bentvena stop and speak into the intercom system; at approximately the same time Giorgio observed McGovern go to the intercom connection in apartment 2-H and speak into it, saying, "Everything is okay." Mangiaracina then saw Struzzieri leave the building, while agents outside saw them walk to their car, remove a brown package from the trunk, and together return to the lobby where Mangiaracina saw them go upstairs again. Shortly thereafter, according to Giorgio, the doorbell rang in apartment 2-H, McGovern answered the bell and returned with a brown package ultimately found to contain heroin. Bentvena and Struzzieri were observed leaving the building a few miuntes after their last entry. In the meantime, Mc-

Govern had asked Giorgio for the money. Giorgio summoned Mangiaracina, his supposed partner, from the lobby, the agents handed an envelope containing $6,000 to Monastersky, and Monastersky handed the package of heroin to Giorgio. Subsequently Struzzieri and Bentvena returned to 525 East 88th Street, where they remained for about an hour.

Considerations similar to those that caused us to affirm the jury's verdict of guilty based on the evidence relating to the January 6 sale cause us to hold that the evidence introduced by the Government relating to the January 13 sale was sufficient to support the jury's verdict of guilty as to the latter transaction. Viewing the evidence, as we must, in the light most favorable to the Government, *United States* v. *Tutino, supra,* and recognizing that involvement in an illegal sale of narcotics may be proved by circumstantial evidence, *United States* v. *Moret, supra,* we cannot say that reasonable jurors could not have found beyond a reasonable doubt that Struzzieri and Bentvena delivered the heroin to Monastersky and McGovern which they, in turn, sold and delivered to Giorgio. And, of course, Monastersky's involvement in the transaction is firmly established.

II.

We now examine the claim of appellant Monastersky that his conviction on both counts should be reversed because, as the record does not show that the heroin sold to the agents was illegally imported, or that Monastersky knew from where it came, his conviction can only stand if the Government proved he had "possession" of the drugs,[4] which, he maintains, the Government failed to do. Monastersky contends the Government's proof establishes only

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[4] See note 3, *supra.*

that he was a "casual facilitator" of the sales in question, in other words that he merely introduced a willing seller to a willing buyer, activity that we held was insufficient to establish possession, either actual or constructive, in *United States* v. *Jones*, 308 F. 2d 26 (2 Cir. 1962). We disagree with appellant. We believe the evidence in this case established that Monastersky had, on both occasions, power to control the disposition of the heroin sufficient to constitute "possession" within 21 U. S. C. § 174. See *United States* v. *Jones, supra.* In *Jones* we reversed a conviction under § 174 that equated mere participation in a sale of narcotics with "possession" of the narcotic drug. In discussing the facts of that case we said:

> We believe the evidence in this case negates a conclusion that defendant Jones had dominion and control over the narcotics handed to Brown by Moore. The pains Jones took in the first instance to find Moore indicate that Jones was unable to consummate the transaction as a business dealing of his. The price and place of delivery were not even discussed with the would-be purchaser until defendant spoke with Moore. No one can say that Jones established these essential details of the affair unless he engages in speculation wholly unwarranted by the trial record. After consummation of the transaction Moore told agent Brown to purchase directly from him in the future and not to deal with anyone else. This statement by Moore negates a finding that Jones could assure, as a matter of course, delivery by Brown to a customer Jones might discover. [308 F. 2d at 31.]

The facts here are quite different. On both January 6 and January 13 Monastersky apparently set the price of the

heroin without consulting with McGovern. On January 6 Monastersky was in the building when Struzzieri delivered the heroin. At both sales to Giorgio, Monastersky remained with McGovern throughout. And during the January 13 transaction Monastersky had the heroin package in his hands, Giorgio paid the money directly to Monastersky, and Monastersky handed the heroin directly to Giorgio. This evidence brings Monastersky's case well within our statement in *Jones* that "evidence showing that a given defendant set the price for a batch of narcotics, had the final say as to means of transfer, or was able to assure delivery, may well be sufficient to charge the defendant with a constructive possession of the narcotics . . ." 308 F. 2d at 31.

Monastersky also contends that the trial court's charge relating to constructive possession was improper. We would be hard pressed to detect error in this charge. In any event, since Monastersky failed to object to the charge at trial, or to request a different charge, he may not, barring special circumstances not present here, raise the issue on appeal. *See United States* v. *Indiviglio*, 352 F. 2d 276 (2 Cir. 1965), *cert. denied*, Feb. 21 1966, —— U. S.——.

Affirmed.